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In the Supreme Court of the United States

OCTOBER TERM, 1982

NORTHERN ELECTRIC COMPANY, A DIVISION OF SUNBEAM CORPORATION,

PETITIONER,

V.

ROSE HARRELL, ON BEHALF OF HERSELF AND ALL PERSONS SIMILARLY SITUATED,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a Title VII claim of class-wide discrimination may be properly analyzed under the "disparate impact" theory where there has been neither an allegation nor evidence of an identifiable practice or policy which, although neutral on its face, allegedly falls more harshly on a minority group.

2. Whether the court of appeals properly applied this Court's decision in *Pullman-Standard v. Swint*, __ U.S. __, 102 S. Ct. 1781, 72 L.Ed. 2d 66 (1982) when it concluded that the district court's finding of no-discrimination was "clearly erroneous."

3. Whether an appellate court should make an initial determination of discrimination based upon facts and legal theories not considered by the district court, rather than remanding the case to the district court for a determination pursuant to the appellate court's rulings.

RULE 28:1 STATEMENT

Parties to this case are:

Northern Electric Company, a division of Sunbeam Corporation*

Rose Harrell, and all persons similiarly situated

*Northern Electric Company, a division of Sunbeam corporation, is a subsidiary of Allegheny International, Inc. Other Allegheny International, Inc. subsidiaries and/or affiliates (except wholly-owned subsidiaries) are Titanium Metals Corporation of American and Bra—Con Industries, Inc.

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NORTHERN ELECTRIC COMPANY, A DIVISION OF SUNBEAM CORPORATION,

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V.

ROSE HARRELL, ET AL,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Northern Electric Company respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in *Harrell, et al v. Northern Electric Company, a Division of Sunbeam Corporation*, No. 80-3781, 672 F.2d 444, *modified on rehearing*, 679 F.2d 31 (5th Cir. 1982).

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Mississippi has not been officially reported. The court's Judgment, together with its supplemental Statement of Facts, appear as Appendix A here-

to. The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 672 F.2d 444 (5th Cir. 1982), and appears as Appendix B. The opinion of the court of appeals on rehearing is reported at 679 F.2d 31 (5th Cir. 1982), and appears as Appendix C.

JURISDICTION

Judgment of the court of appeals was entered on April 5, 1982. On timely Petition for Rehearing and Suggestion for Rehearing En Banc, the court entered an order modifying its original decision and denying in all other respects the Petition for Rehearing on June 21, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTE INVOLVED

The statute involved is Section 703 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e-2 (1976). See Appendix D.

STATEMENT OF THE CASE

Plaintiff/Respondent Rose Harrell brought this action against Defendant/Petitioner Northern Electric Company (hereinafter sometimes referred to as "NECO") on April 21, 1978, alleging that Petitioner practiced discrimination against blacks in the hiring of clerical employees at its Hattiesburg, Mississippi facility in viola-

tion of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, *et seq.* At the close of the first stage of a bifurcated trial, judgment was rendered for NECO. Specifically, the district court ruled that NECO had not discriminated on a class-wide basis against blacks in filling clerical positions,[1] nor had it discriminatorily denied the Plaintiff, Rose Harrell, a clerical position because of her race.

Plaintiff appealed these adverse rulings, and in a decision rendered by a two-judge panel of the United States Court of Appeals for the Fifth Circuit, the court reversed the decision of the district court and rendered judgment for Plaintiff, finding unlawful discrimination against both the class and Plaintiff Harrell individually. Additionally, the court rendered judgment in favor of three (3) non-party witnesses who testified in support of Respondent's claim of class discrimination. In reversing the decision of the district court, the Fifth Circuit rejected a number of findings of fact by the district court which it found to be "clearly erroneous." With respect to the issue of discrimination, however, the court made its own "independent determination." Moreover, in arriving at its independent determination of discrimination, and contrary to the disparate treatment analysis followed by the district court, the court utilized the disparate impact analysis.

[1] The district court had previously certified the class as consisting of "all qualified Negro persons who have applied for employment in clerical positions with the defendant and who were not hired in a clerical position because of their race."

Subsequent to the Fifth Circuit's decision, this Court issued its decision in *Pullman-Standard v. Swint*, __ U.S. __, 102 S. Ct. 1781, 72 L.Ed. 2d 66 (1982), in which the Court held that the question of discriminatory intent is a factual matter subject to the clearly erroneous standard of Rule 52 of the Federal Rules of Civil Procedure. On rehearing, the Fifth Circuit acknowledged this Court's ruling in *Pullman-Standard v. Swint*, and summarily reaffirmed its prior judgment, stating:

> We reaffirm our conclusion that the trial judge erred in his assessment of the disparate impact issue. The error committed was essentially an error of law; the district court erred in its application of controlling legal principles to stipulated facts. The district court also erred in its evaluation of the stipulated facts as they related to the disparate impact issue. To the extent the assessment was factual it was clearly erroneous, Fed.R.Civ.P. 52(a). To the extent the assessment involved legal conclusions, it was legally incorrect.

679 F.2d at 31 (App. C-2).

Thus, the Fifth Circuit apparently concluded that the district court was clearly erroneous in its application of the facts to the disparate impact issue, despite the fact that the district court did not even consider that issue.[2]

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[2] On rehearing, the Fifth Circuit also concluded that its rendering of judgment in favor of three non-party witnesses was not consistent with the bifurcated status of the litigation, and vacated that portion of its prior opinion in which judgment was rendered in favor of those individuals.

REASONS FOR GRANTING THE WRIT

I. THE FIFTH CIRCUIT'S ANALYSIS OF THIS CASE UNDER THE DISPARATE IMPACT THEORY IS INCONSISTENT WITH SUPREME COURT PRECEDENT.

The Plaintiff below, Rose Harrell, alleged that NECO practiced discrimination against blacks in the hiring of clerical employees at its Hattiesburg, Mississippi facility. She attacked no specific employment device or requirement (i.e., educational standard, height or weight restrictions, aptitude test, etc.), but rather alleged that NECO has generally followed a practice of intentional discrimination toward blacks in hiring clericals. In evaluating Harrell's claim of class discrimination, the Fifth Circuit rejected NECO's contention that the only appropriate analysis was the disparate treatment theory and found NECO liable to the class based upon its finding of disparate impact. This ruling, it is submitted, is manifestly at odds with this Court's interpretation of the law.

The genesis of the disparate impact theory is *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), where the Court held that employment practices which are "fair in form, but discriminatory in operation" may constitute a violation of Title VII. Under such an analysis, in order to establish a *prima facie* case, a plaintiff must demonstrate the existence of employment practices that are "facially neutral in their treatment of different groups but that in

fact fall more harshly on one group than another." *Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). If that burden is met, "the employer must then demonstrate that any given requirement has a manifest relationship to the employment in question in order to avoid a finding of discrimination." *Connecticut v. Teal*, __ U.S. __, 102 S. Ct. 2525, 73 L.Ed. 2d 30 (1982). Proof of discriminatory motive, under the disparate impact theory, is not required. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432. On the other hand, under the disparate treatment theory, the analysis is whether the employer has purposely treated some individuals less favorably than others because of their membership in a minority group. A fundamental difference in the elements of the two types of theories is that, under the discriminatory treatment theory, "proof of discriminatory motive is critical." *Teamsters v. United States*, 431 U.S. 324, 334 n.15 (1977).

The common thread running through the cases where the Court has applied the disparate impact theory is that a specific and identifiable procedure or mechanism, fair on its face, was being attacked by the plaintiff. Thus, in *Griggs v. Duke Power Co., supra*, the focus of the case was the defendant's requirement of a high school diploma which was found to have had a disproportionate impact on blacks. In *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975), the defendant's use of a written intelligence test in its hiring process was at issue. In *Dothard v. Rawlinson*, 433 U.S. 321 (1977), a height and weight requirement was challenged. Likewise, in *New York City Transit Authority*

v. Beazer, 440 U.S. 568 (1979), the disparate impact theory was used to test the defendant's policy of refusing to employ persons in methadone drug treatment programs. And, more recently, in *Connecticut v. Teal, supra*, the impact on blacks of a written examination which was required for promotion was the subject of the analysis.

Conversely, in those cases which have concerned claims of alleged general unfavorable treatment toward a protected group rather than the use of an employment device that, though neutral on its face, impacts the protected group more harshly than the majority group, the Court has consistently applied the disparate treatment analysis. For example, in *Hazelwood School District v. United States*, 433 U.S. 299 (1977), the government was attacking alleged subjective hiring procedures which had resulted in statistical disparities in hiring. 433 U.S. at 303. That case was treated by the plaintiff, and analyzed by the Court, under a "theory of discrimination [which] was simply that the [employer], in violation of Section 703 (a) of Title VII, regularly and purposefully treated negroes...less favorably than white persons." 433 U.S. at 306, n.12. Perhaps the Court's most clearly articulated view on this issue was in *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978), where the trial court analyzed the plaintiffs' allegation of discriminatory hiring practices under both the disparate treatment theory and the disparate impact theory. 438 U.S. at 569. The Court held that the only proper approach was the disparate treatment analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792

(1973), specifically noting that the case did not involve an employment test or other "particularized requirement". 438 U.S. at 575, n.7.

In the instant case, the critical distinctions made by this Court between the disparate impact theory and the disparate treatment theory were all but ignored by the Fifth Circuit. At no time was an identifiable policy, device, or requirement brought into issue by Respondent, much less shown to have had a disparate impact on blacks. The entire case was litigated on the basis of Respondent's allegation that "defendant has intentionally engaged in unlawful employment practices."[3] Yet, the Fifth Circuit reversed the district court's finding of no intentional discrimination and rendered judgment for the Plaintiff using a disparate impact model. Clearly, the decision of the Fifth Circuit in this regard is directly contrary to Supreme Court precedent.

II. THE FIFTH CIRCUIT'S ANALYSIS OF THIS CASE UNDER THE DISPARATE IMPACT THEORY IS CONTRARY TO DECISIONS IN OTHER CIRCUITS.

The decision of the Fifth Circuit also conflicts with decisions of the Third, Fourth, Eighth, Ninth, and Tenth Circuits. Each of those circuits has properly refused to apply the disparate impact theory to allegations of general discriminatory practices where no identifiable device or procedure has been alleged to have a disproportionate impact upon a minority group.

[3] Plaintiff's Complaint, at para. 10.

The Third Circuit, in *Croker v. Boeing Co.*, 662 F.2d 975 (3rd Cir. 1981), reviewed the plaintiff's claim that the defendant had engaged in a pattern or practice of race discrimination in hiring, placement and promotion, layoffs, job classifications, discipline and harrassment of employees. The plaintiff did not attack any specific procedure or requirement that, although facially neutral, had a disparate impact on blacks. The court recognized the differences between the impact and treatment theories and applied a disparate treatment analysis, holding that the statistical evidence presented by the plaintiff did not establish a pattern or practice of purposeful discrimination.

The Fourth Circuit, in *Pope v. City of Hickory, N.C.*, 679 F.2d 20 (4th Cir. 1982), rejected the plaintiffs attempt to have the statistical evidence analyzed under both the treatment and impact theories, stating:

> It is obvious that the plaintiff is not complaining in this case of some employment practice or procedure of the defendant, which, though neutral or fair on its face, has a discriminatory impact on blacks and thus does not fit within the model disparate impact claim.

Id. at 22.[4]

[4] This Fourth Circuit decision appears to conflict with a previous decision of that court holding that both the disparate impact and disparate treatment theories may be applied to the same set of facts as alternative theories. *See Wright v. National Archives & Records Service*, 609 F.2d 702, 711 (4th Cir. 1979).

The Eighth Circuit, in *Taylor v. Teletype Corporation*, 648 F.2d 1129 (8th Cir.), *cert. denied*, 102 S. Ct. 515 (1981), was presented with statistical evidence concerning alleged disparities in the demotion of blacks. Rejecting an argument by the defendant that the disparate impact analysis had been applied, the court held that the district court had properly viewed the claims as alleging disparate treatment, explaining:

> A Griggs-type case challenges facially neutral standards that affect employees in a significantly discriminatory pattern. *See, e.g., Dothard v. Rawlinson*, 433 U.S. 321, 329, 53 L.Ed. 2d 786, 97 S. Ct. 2720, 2726 (1977) (height and weight requirements); *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 425, 45 L.Ed. 2d 280, 95 S. Ct. 2362, 2375 (1975) (standardized tests); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 28 L. Ed. 2d 158, 91 S. Ct. 849 (1971) (high school diploma and standardized tests). Here, plaintiffs do not challenge objective criteria; rather, they allege improper use of subjective procedures for demotions.

Id. at 1132-33 n.6.

In *Heagney v. University of Washington*, 642 F.2d 1157 (9th Cir. 1981), the plaintiff contended that classifying certain employees as exempt from state personnel law was a neutral employment practice that had a disproportionate impact on the salaries of female employees. In meeting this argument, the Ninth Circuit first gave its interpretation of the decisions in *Teamsters*, *Griggs*, and *Dothard v. Rawlinson:*

> In a disparate impact case, a Plaintiff must show that *some facially neutral employment practice* has a *substantially disproportionate impact* upon a group protected by Title VII. Examples of such outwardly neutral employment practices include height and weight requirements, or certain types of employment tests adversely affecting those of certain cultural backgrounds [citations omitted].

Id. at 1163 (emphasis added).

The court then held that the case was inappropriate for analysis under a disparate impact theory:

> It is apparent, however, that the creation of jobs that are exempt from the Washington personnel law cannot be equated with such well-defined objective employment practices as personnel tests or minimal physical requirements....The gravamen of Heagney's complaint is that the lack of well-defined employment criteria allowed a pattern or practice of discrimination to exist. We therefore conclude that "impact" analysis is inappropriate and that Heagney was required to prove disparate treatment.

Id. at 1163.

Recently, in *Mortensen v. Callaway*, 672 F.2d 822 (10th Cir. 1982), the Tenth Circuit rejected the notion that the disparate impact theory could be used where there were no allegations of a facially neutral practice that had a disproportionate impact upon a minority group. The plaintiff in that case sought individual relief under both the dis-

parate impact and disparate treatment theories, and, on appeal, claimed that she had proven a *prima facie* case of disparate impact. The court disagreed, finding that although the plaintiff had introduced statistical evidence showing a lack of female supervisors, "she [had] not pointed to any employment practice that, neutral on its face, [had] caused women not to be promoted to supervisory positions." *Id.* at 824.

Thus, the Fifth Circuit's decision in the instant case is in direct conflict with decisions of the Third, Fourth, Eighth, Ninth, and Tenth Circuits. Each of these circuits has expressly limited the applicability of a disparate impact theory to cases where specific employment requirements, although facially neutral, have a disproportionate impact upon a minority group. This split of authority among the circuit courts creates a pressing need for the Court to provide guidance for the uniform adjudication of cases in this significant area of the law.

III. *THE FIFTH CIRCUIT'S ANALYSIS OF THIS CASE UNDER THE DISPARATE IMPACT THEORY CONFLICTS WITH ITS OWN PRECEDENT*

Ironically, not only does the Fifth Circuit's decision conflict with Supreme Court precedent and the rulings of other circuit courts, it also conflicts with its own recent precedent.

In *Pouncy v. Prudential Insurance Company of America*, 668 F.2d 795 (5th Cir. 1982), decided prior to the court's decision in this case, a different panel of the Fifth Circuit discussed at length the appropriate use of the disparate impact and disparate treatment models. The court expressly stated that the disparate impact model was appropriate only where it is alleged that an identifiable employment policy, although neutral in form, has a significant impact on a protected group. *Id.* at 799-80. In such cases, a plaintiff need only show that a facially neutral practice produces a significant adverse impact; the employer's intent to discriminate is not at issue. *Id.* at 800. The court emphasized, however, that the disparate impact analysis is *not appropriate* where a plaintiff is attempting to establish through the use of statistics that intentional discrimination has been the motivating factor in a number of specific employment decisions:

> *The discriminatory impact model of proof in an employment discrimination case is not, however, the appropriate vehicle from which to launch a wide ranging attack on the cumulative effect of a company's employment practices.* Nor may just any employment practice be challenged under this model simply because an uneven racial balance exists in an employer's workforce.

Id. at 800 (emphasis added).

The analysis in *Pouncy* was subsequently reaffirmed by still another panel of the Fifth Circuit in *Payne v. Travenol Laboratories, Inc.*, 673 F.2d 798 (5th Cir. 1982).

There, the court held:

> Travenol's interviewing cannot be viewed as a neutral practice with a disparate effect thus subject to *Griggs v. Duke Power Co., supra*, as Payne argues. Hiring processes that rely heavily on subjective interviewing provide an opportunity for the intentional discrimination that lies at the heart of a disparate treatment case. Payne does not urge that Travenol has violated Title VII by seeking alert, capable operative workers; rather she charges that Travenol masked its intentional discrimination by purporting to screen applicants for these qualities while actually discriminating on the basis of race. Subjective discrimination in interviewing or in similar evaluation processes has repeatedly been held to fall into the disparate treatment branch of Title VII law. [Citations omitted.]

Id. at 817.

Clearly, the Fifth Circuit's decision in the instant case is irreconcilable with the decisions in *Pouncy* and *Payne*.[5] Had the principles enunciated in *Pouncy* and *Payne* been applied in the instant case, there can be no doubt but that the findings and conclusions of the trial court would have been left undisturbed. Moreover, because of the contradictory decisions by the Fifth Circuit, the

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[5] In *Johnson v. Uncle Ben's Inc.*, 657 F.2d 750 (5th Cir. 1981), petition for cert. filed __ U.S.L.W. __ (U.S. Apr. 30, 1982) (No. 81-2026), yet another panel of the Fifth Circuit, contrary to *Pouncy* and *Payne*, followed the same rationale as did the panel in the instant case. The petition in *Uncle Ben's* raises similar issues as does the instant petition.

district courts and litigants in that circuit have no way of knowing what standards to apply in Title VII litigation.[6]

IV. *THE FIFTH CIRCUIT'S ANALYSIS IMPROPERLY MINIMIZED THE PLAINTIFF'S BURDEN OF PROOF AND IMPROPERLY INCREASED THE DEFENDANT'S BURDEN OF REBUTTAL.*

In applying the disparate impact model rather than the disparate treatment model, the Fifth Circuit effectively minimized the Plaintiff's burden of proof, and increased the Defendant's burden of rebuttal.

A. *Plaintiff's Burden of Proof*

While statistics may be used in both treatment and impact cases, a much greater burden must be met to prove class-wide disparate treatment because the Plaintiff must prove that *intentional* racial discrimination is "the company's standard operating procedure—the regular rather than the unusual practice." *Teamsters*, 431 U.S. at 336. To meet this burden, *gross statistical disparities* must be shown. *Teamsters*, 431 U.S. at 335 n.15. The quantum of disparity required to show intentional discrimination must be significantly greater than the disparity caused by a neutral policy because, with a finding of class-wide disparate treatment, the court is necessarily making a judicial determination that all employment decisions of

[6] The Fifth Circuit declined Petitioner's application for an *en banc* rehearing in the present case, which would have enabled the court to reconcile these conflicting authorities.

the type in question were racially motivated without analyzing each individual decision.

In analyzing Plaintiff's evidence using a "disparate impact assessment", 672 F.2d at 446 (App. B-5), the Fifth Circuit concluded that although "[a]ppellant's statistical basis is not perfect...the disparity between the percentages of blacks applying and those hired...is sufficient to raise a *prima facie* case of class discrimination." 672 F.2d at 447 (App. B-7). On its face, however, the decision below cannot sustain a finding that "gross statistical disparity" was established by Respondent. Although the court discussed various types of statistical evidence presented by Respondent, the gravamen of the court's review of the district court's finding of no class-wide discrimination rested upon whether four (4) offers of employment were made. Under the court's analysis, if the four offers *were not made*, there existed a *substantial statistical disparity* requiring a finding of class-wide discrimination; if the four (4) offers *were made*, there was *no class-wide discrimination*.[7]

The court then found that while the four offers may have been made, there was insufficient evidence for the district court to conclude that the offers were for clerical

[7] As the court stated in its opinion, "...If all four of the purported 'offerees' are included in the calculations, the statistical disparity only slightly exceeds two standard deviations. If the 'offerees' are included and the transferees are excluded, the disparity falls below two standard deviations, belying a *prima facie* case of discrimination." 672 F.2d at 447 (App. B-7, 8).

positions.[8] Therefore, according to the Fifth Circuit, Plaintiff had proven class discrimination under the disparate impact model. In short, by using the disparate impact model, the court determined on the strength of four employment decisions that all decisions regarding the hiring of clericals were discriminatory.

B. *Defendant's Burden of Rebuttal*

Conversely, while the Fifth Circuit's application of the disparate impact theory effectively minimized Plaintiff's burden of proof by relieving Plaintiff of the burden of showing a gross statistical disparity, Defendant's burden of rebuttal became virtually impossible to meet.

Under the disparate impact theory, once a plaintiff has shown that a facially neutral employment practice has a significant discriminatory impact upon a minority group, the burden then shifts to the defendant to demonstrate that the "given requirement [has] a manifest relationship to the employment in question," in order to avoid a finding of discrimination. *Griggs, supra* at 432. Obviously, an employer's burden to demonstrate that a given "requirement" has a "manifest relationship to the employment in question" is predicated upon the existence of a "requirement." If there is no identifiable practice which is being attacked, how can the employer produce "manifest relationship" evidence? In short, a defendant *cannot* rebut a *prima*

[8] The court rejected the credibility findings of the district court on this issue as clearly erroneous. This makes the Fifth Circuit's statistical analysis all the more tenuous.

facie case of disparate impact where no specific practice or procedure has been identified by the plaintiff. Thus, the application of the disparate impact theory to a case such as this where no identifiable practice is being attacked is both improper from a conceptual standpoint and impossible from an evidentiary standpoint.[9]

V. *THE FIFTH CIRCUIT FAILED TO PROPERLY APPLY THE CLEARLY ERRONEOUS STANDARD TO THE DISTRICT COURT'S FINDING OF NO DISCRIMINATION, AS WELL AS TO ITS FINDINGS OF SUBSIDIARY FACTS.*

The Fifth Circuit's reversal of the district court's finding of no discrimination was ultimately based upon the Fifth Circuit's conclusion with regard to job offers to four (4) black applicants for clerical positions. Applying the "clearly erroneous" standard, the court rejected the district court's finding that the four clerical job offers were made. Then, making an "independent determination of the ultimate issue of discrimination," 672 F.2d at 446 (App. B-3), the court concluded that Respondent had made a *prima facie* case of class-wide racial discrimination. On rehearing, when faced with this Court's recently announced decision in *Pullman-Standard v. Swint, supra*, the Fifth Circuit reaffirmed its finding of class discrimination, stating in the decision on rehearing that it had applied the

[9] The Fifth Circuit in *Pouncy* recognized this, stating: "Identification by the aggrieved party of a specific employment practice responsible for the disparate impact is necessary so that the employer can respond by offering proof of its legitimacy." 668 F.2d at 796.

"clearly erroneous" standard of review mandated by *Swint*.

Where, as here, an appellate court is reviewing the findings of a district court sitting without a jury, the determination for the appellate court under Rule 52(a) is not whether it would have made the same finding as did the trial court, but whether "on the entire evidence [it] is left with the definite and firm conviction that a mistake had been committed." *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 123; *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). It is respectfully submitted that the Fifth Circuit overstepped the narrow limits of the clearly erroneous standard in rejecting the district court's finding with respect to the four (4) clerical job offers. As to each offer, business records of both the company and the Mississippi State Employment Service, coupled with testimony concerning standard company practice, more than sufficiently support the district court's finding that the offers were made.[10]

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[10] The Company's personnel director testified that it was then and had been the regular business practice of NECO to record rejected job offers on the applications on the respective applicants. On the application of each of the four applicants in question, there were notations indicating that job offers had been made. (The evidence reflected that clerical offers which were declined were made to nine (9) whites as well.)

Janice Wilson (Richards) was referred to NECO by a private employment agency for consideration for a clerical position and she indicated on her application form that her first and second choices were clerical positions. A notation on her application form states "Offered Job—Has Accepted Employment On Other Job."

Deborah McGee was referred to NECO by the Mississippi State Employment Services (MSES) for a clerical position and likewise indicated on her application form that both her first and second choices were clerical positions. A notation on her application form states:

Even assuming *arguendo* that the Fifth Circuit properly found the district court to be clearly erroneous in its finding that the four (4) clerical offers were made, the Fifth Circuit's conclusion that the district court's finding of no class-wide discrimination was clearly erroneous simply belies the facts of this case. During the time period in issue, over 500 individuals made applications for clerical positions. The Fifth Circuit, after reviewing the district court's findings and concluding that the district court was clearly erroneous, made its own "independent determination" that, excluding the four offers, a statistical showing of class discrimination had been established. Without any further analysis, the court on rehearing subsequently held that its finding of class discrimination satisfied the clearly erroneous standard.

Defendant submits that the Fifth Circuit did nothing more than give lip service to this Court's decision in *Pullman-Standard v. Swint, supra.* The Fifth Circuit's

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(Footnote 10 continued)
"9/19/77 part-time personnel, never showed up for work."

Allen Thompkins also was referred to Defendant by MSES for a clerical position, and he indicated on his application form that his first and second choices were clerical positions. A notation of his application form states: "Called 8/23/77 not interested now, attending school."

Carolyn Reed was the fourth applicant whose application form indicated that clerical employment was offered. She was also referred by MSES for a clerical job. Her application form indicates that she was questioned about and declined interest in a typing job.

In each of these cases, records were kept in the ordinary course of business reflecting employment was offered to the applicant. Even though the appellate court may have come to a different conclusion, it cannot be said that the district court's findings that clerical positions were offered to these individuals were without support in the record.

"clearly erroneous" finding was based solely on its exclusion of offers of clerical employment to four (4) black applicants from the applicant flow analysis.[11] It is inconceivable that the district court was clearly erroneous in finding that there was no evidence of gross statistical exclusion of blacks where the Fifth Circuit's own applicant flow analysis of NECO's clerical hiring practices, involving over 500 offers and rejections, rested upon the inclusion or exclusion of four (4) offers of employment. Clearly, although the Fifth Circuit may have come to a different conclusion had it been sitting as the trial court, it cannot be said that the district court's finding of no discrimination was clearly erroneous.

It is also significant that, even excluding the four clerical offers, the disparity between the white direct hire ratio and the black direct hire ratio is 2.56 standard deviations,[12] falling well below three standard deviations. This

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[11] The Fifth Circuit also questioned the exclusion of transfers in the applicant flow analysis relied upon by the district court. However, the court did not make this a basis for its conclusion that the district court was clearly erroneous, stating that under its (the Fifth Circuit's) analysis, it did not matter whether transfers were considered or not. See 672 F.2d at 447 (App. B-7).

[12] Standard deviations may be calculated as follows:

$$\frac{np - x - .5}{\sqrt{npq}}$$

Applying the direct hire data, n = the total number of both races actually hired (137), p = the proportion of blacks in the applicant pool (80/582 or .137), q = the proportion of whites in the applicant pool (502/582 or .863), np = the expected number of black hires (137 x .137 or 18.8), and x = the actual number of blacks selected (8). The .5 in the

Court has previously held that a challenged practice may become suspect if the difference between the expected value and the observed number is greater than "*two or three* standard deviations." *Castaneda v. Partida*, 430 U.S. 482 (1977), *Hazelwood School District v. United States*, 433 U.S. 299 (1977). Thus, the 2.56 standard deviations found in this case, even when *excluding offerees*, is well within the limits of the "two or three" test recognized by this Court. Presumably, this Court did not set a "brite line" in *Castaneda* because of the inherent impreciseness of utilizing mathematical formulas to create inferences of discrimination, but rather suggested a range within which trial courts could evaluate statistical analyses in the context of the particular facts of each case. Here, the 2.56 standard deviations fall well within the range discussed in *Castaneda*. Under such circumstances, the Fifth Circuit overstepped its appellate role by concluding that, as a matter of law, there was no basis for the district court's finding that Respondent had failed to establish a *prima facie* case.

VI. *EVEN IF THE DISPARATE IMPACT THEORY IS APPROPRIATE, THE FIFTH CIRCUIT IMPROPERLY APPLIED IT IN THIS CASE.*

(Footnote 12 continued)
formula is a correction factor used in pools of this size and nature. (See App. B-6). The standard deviation computes out as follows:

$$\frac{18.8 - 8 - .5}{\sqrt{18.8(.863)}} = \frac{10.3}{\sqrt{16.2}} = 2.56$$

A. Petitioner had no notice that this was a disparate impact case.

The pertinent part of Plaintiff's Complaint, as amended, alleges that "defendant has intentionally engaged in unlawful employment practices at its Hattiesburg facility in violation of Section 703(a) of Title VII." The Plaintiff having alleged intentional discrimination, and not having alleged that any practice or policy had a disparate impact on blacks, this case was tried as a disparate treatment case. Accordingly, the district court's decision was limited to consideration of the facts under the disparate treatment theory. Nonetheless, the Fifth Circuit reviewed the case using the disparate impact analysis.[13]

While the Federal Rules of Civil Procedure call for liberal treatment of pleadings, a complaint is nevertheless required to "adequately set forth a claim and give the Respondents fair notice of its basis." *Conley v. Gibson*, 355 U.S. 41, 48 (1957). NECO was totally unapprised in this case that it was being called into court to defend a disparate impact case. The Complaint contained no reference whatsoever to any policy which allegedly had a disproportionate impact on blacks, but on the contrary, affirmatively alleged intentional discrimination. This failure

[13] The Fifth Circuit reasoned that it was not improper to consider the disparate impact theory because both parties had introduced statistical evidence which is relevant to disparate impact and disparate treatment consideration. Citing Rule 15(b) of the Federal Rules of Civil Procedure, the court implicated that the issue of disparate impact had been tried by implied consent of NECO. See 672 F.2d 446 n.3 (App. B-4).

to give NECO notice regarding a disparate impact claim was unavoidably prejudicial to NECO inasmuch as "the factual issues, and therefore the character of the evidence presented, differ when the Plaintiff claims that a facially neutral employment policy has a discriminatory impact on protected classes." *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252 n.5 (1981).

A similar question of adequate notice was raised in *Ste. Marie v. Eastern Railroad Association*, 650 F.2d 395 (2d Cir. 1981), where the plaintiff, having alleged that the employer maintained practices that discriminated against female employees, argued that the evidence presented made out a *prima facie* case under both the disparate impact and the disparate treatment theories. The court rejected this argument, stating:

> We reject this belated attempt to introduce a new theory of liability. As the district court's liability opinion made clear, ... the case was tried and decided below, with the consent of both parties, on a theory of disparate treatment. To hold the Defendants to the more stringent burden applicable in a disparate impact case at this date would be manifestly unfair.

650 F.2d at 399. Likewise, in the instant case, even assuming the disparate impact analysis might have been applicable in this case, it should not have been applied for the first time by the appellate court after the case had been pled, tried, and decided under the disparate treatment theory.

B. *The Fifth Circuit incorrectly made a determination of discrimination based upon both facts and theories which were not considered by the district court.*

In reviewing the district court's disposition of this case, the Fifth Circuit overturned as "clearly erroneous" important findings of fact by the district court that offers of clerical employment had been made to four (4) black applicants. The Fifth Circuit also concluded that the disparate impact theory, a theory which had not been considered by the district court, could form the basis of recovery for Plaintiff.[14] Then, after reversing these critical findings of fact and concluding that an alternative theory was applicable to these new facts, the Fifth Circuit proceeded to apply these new facts to the theory of law not considered by the district court.

As a general proposition, where an appellate court determines that the lower court has applied an incorrect legal standard, the correct procedure is to remand the case back to the trial court with the direction that the matter be reconsidered in light of the proper test. *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 331-332 (1974); *Malat v. Riddell*,

[14] On rehearing, the Fifth Circuit stated that the district court had erred in its evaluation of the stipulated facts as they related to the disparate impact issue. It is difficult to see how this is possible in view of the fact that the district court did not even consider the disparate impact issue. The district court, like Petitioner, viewed the case as a disparate treatment case.

383 U.S. 569, 570 (1966).[15] In this case, remand was all the more appropriate because, not only was an improper standard (according to the Fifth Circuit) used by the district court, but key subsidiary facts to which the "correct" standard was to be applied had also been changed by the appellate court. By failing to remand the case, and instead applying a different legal standard to different facts, the Fifth Circuit, in effect, assumed the role of a trial court. Petitioner submits that even if the rulings of the Fifth Circuit on the underlying issues are correct, the Fifth Circuit should have remanded the case to the trial court for further consideration in light of the appellate court's rulings.

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[15] In *Trust Co. of Georgia v. Ross*, 392 F.2d 694, 696 (5th Cir.), *cert. denied*, 393 U.S. 830 (1968), the Fifth Circuit itself has previously stated:

> Ordinarily, in any non-jury trial where an improper test has been applied, the accepted procedure is to remand to the trial court with the direction that the matter be reconsidered in light of the proper test.

CONCLUSION

For the foregoing reasons, the petitioner for writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE

I, Walter W. Christy, hereby certify that I have on this ____ day of September, 1982 caused three copies of the above and foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to be served by United States mail, certified, return receipt requested, upon the following counsel of record for Respondent:

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